No. 283.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

THE UNITED STATES, *Petitioner*,

vs.

MAGNOLIA PETROLEUM COMPANY, E. R. BROWN, R. WAVERLY SMITH, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

The "Statement" in petitioner's brief (pp. 5-9) is not complete and further contains certain inaccuracies due to inadvertence. Counsel, therefore, submit the following statement, which is as concise as the facts warrant.

STATEMENT.

Respondent paid federal income and income and profits taxes as follows (Finding of Fact II, R. 24, and Finding of Fact V, R. 25):

For the year 1916, income taxes.	$215,852.72
For the year 1917, income and profits taxes	1,966,600.87
Total tax for the two years....	$2,182,453.59

The taxes for the year 1916 were not paid under protest (Finding of Fact II, R. 24); those for the year 1917 were paid involuntarily and under a written protest as follows (Finding of Fact V, R. 25):

> "The Magnolia Petroleum Company hereby protests against the payment of Income Taxes which are alleged to be imposed by the Act approved September 8, 1916, as amended by the Act approved October 3, 1917, and the War Income Tax Act embodied in said Act approved October 3, 1917, and the War Excess Profits Tax Act embodied in said Act approved October 3, 1917. The said Company protests against the payment of said taxes in the amount of $1,966,600.87, or in any other amount at this time or any other time, and said taxes are paid, by the Company under protest, involuntarily and under duress in order to avoid the penalties as prescribed in said Acts for non-payment which the Collector of Internal Revenue for this district states he will enforce against said Company in the event payment is not made. The grounds, among others, of such protest and involuntary payment are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint stock company or asso-

ciation or insurance company within the meaning and intendment of said Acts; the regulations which have been attempted to be prescribed under said Acts are not authorized thereby, and that the method of applying the rates of taxation as is attempted in Article 16 and in other articles of said regulations under the War Excess Profits Tax Law is arbitrary and unjust, and without sanction in said Act. The said company hereby formally notifies the said Collector of Internal Revenue and the Commissioner of Internal Revenue of its purpose and intention to institute suit or suits against them or either of them or against the United States, as the said company may be advised, for the recovery of said sum or any part thereof, together with interest and all proper costs."

Finding of Fact XIX (R. 35) is as follows:

"Regulations No. 33 (Revised) Governing the collection of the Income Tax imposed by the Act of September 8, 1916, as amended by Act of October 3, 1917," promulgated January 2, 1918, were vague and ambiguous, especially in reference to depletion, inventories and depreciation so that it was impossible for plaintiff when it filed its first amended return on May 27, 1918 (R. 37, Q. 38), to correctly calculate the amount of depletion and depreciation deductions to which plaintiff was entitled under the law and it was likewise impossible for plaintiff, because of the aforesaid conditions of said regulations, to correctly calculate its opening and closing inventories and that the conditions aforesaid continued up to and subsequent to the date of payment of said tax for said year.

Respondent filed refund claims within the time prescribed by law in respect of taxes for each of the above years as follows:

For the year 1916: On June 17, 1918, a second amended return, which showed respondent had overpaid its taxes in the amount of $30,217.11, was filed with the Commissioner of Internal Revenue and was attached to and made a part of a refund claim in that amount (Finding of Fact III, R. 24). Thereafter a "third amended return was attached to and made a part of a refund claim which was filed with the Collector of Internal Revenue at Dallas, Texas, on September 20, 1920, as aforesaid, and was for the refundment of $114,565.44, 'or such greater amount as is legally refundable' " (Finding of Fact IV, R. 24).

For the year 1917: On June 12, 1920, respondent duly filed with the Collector of Internal Revenue a refund claim for $1,966,600.87, being the full amount of taxes which it paid for said year (Finding of Fact VI, R. 26), and "Thereafter, to wit, on September 20, 1920, plaintiff filed with the aforesaid collector of internal revenue another refund claim on account of the year 1917 for the sum of $1,005,519.42, 'or such greater amount as is legally refundable.' There were attached to such claim and made a part thereof, third amended income and excess-profits tax returns for the calendar year 1917, which indicated a total income and war excess-profits tax liability on the part of plaintiff for the year 1917 in the amount of $961,081.45." (Finding of Fact VI, R. 27.)

At this point Findings of Fact VII and VIII (R. 27) become pertinent. They are respectively as follows:

> Shortly after plaintiff, on September 20, 1920, filed its aforesaid refund claims for the years 1916 and 1917 of which claims a third amended return of each of such years was made a part, plaintiff, by its proper representatives actively negotiated

with officials of the Bureau of Internal Revenue to secure settlement of its taxes for the years 1916 and 1917 and refunds of overpayments which it had made for said years.

Plaintiff furnished to the proper representatives of the Bureau of Internal Revenue all necessary facts and data in support of its refund claims theretofore filed for the years 1916 and 1917 and in a manner acceptable to the officials of said bureau and in accordance with its rules and regulations.

Thus it is shown respondent filed two refund claims for each of the years involved and the second refund claim for each year filed on September 20, 1920, had attached thereto and made a part thereof, third amended returns.

Under date of October 8, 1923, the Commissioner of Internal Revenue advised respondent in respect of its refund claims for these years as follows:

The claim for refund of $114,565.44 income taxes for the year 1916 will be allowed for $105,571.95 and rejected for $8,993.49, and the claim for refund of $1,966,600.87 income and excess profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01. The claims for refund of $30,217.11 income taxes for 1916 and $1,005,519.42 income and profits taxes for the year 1917 will be rejected in full.

The rejection of the claims in the above amounts will appear officially in the next schedule to be approved by the commissioner (Finding of Fact IX, R. 27).

The above mentioned action of the Commissioner upon respondent's four refund claims is more clearly shown by the tables appearing on pages 10 and 11.

Finding X, R. 28, is as follows:

> The Commissioner of Internal Revenue upon facts duly furnished him by plaintiff with its refund claims, or separately, and upon facts agreed upon, allowed plaintiff's refund claims on October 11, 1923, as follows:
>
> Year 1916, claim filed September 20, 1920, for $114,565.44, allowed for $105,571.85. * * *
> Year 1917, claim filed June 12, 1920, for $1,966,600.87, allowed for $1,131,075.86. * * *

On November 22, 1923, respondent received an official "Certificate of Overassessment" in respect of each of these years, showing an overassessment in the respective amounts shown above. Each of these certificates stated:

> This overassessment is allowed in connection with the examination of a claim for refund filed by you within the required time as prescribed * * * (Findings of Fact XI and XII, R. 28, 29).

There accompanied the above mentioned certificates of overassessment government check in payment of the amount in which, as shown, respondent had been advised by the Commissioner, the refund claims had been "allowed," such amounts being as follows (Finding of Fact XIII, R. 30):

For the year 1916, income taxes.	$105,571.95
For the year 1917, income and excess profits taxes	1,131,075.86
Total tax refunded	$1,236,647.81

No interest was paid plaintiff at the time of the above mentioned refund. The certificates of overassessment each concluded with the statement that "Interest status will be determined as soon as the necessary data can be assembled" (Finding of Fact XI, XII, R. 28, 29).

Under date of January 18, 1924, the Commissioner advised respondent that—

> Section 1324(a) of the revenue act of 1921 authorizes the payment of interest on amounts refunded only upon the allowance of refund or credit claims. It is, therefore, held that if a refund is made subsequent to the filing of a refund claim that part of the overassessment which is based upon the ground or basis of the claim constitutes an allowance of the claim in that amount (upon which interest is payable), but that interest is not allowable upon any amount allowed other than on the basis of the claim, the latter amount being allowed under the general authority of section 252 of the revenue act, without reference to a claim having been filed (Finding of Fact XIII, R. 31).

The above is followed by a calculation of interest proposed to be allowed on the "basis of claim" theory but there is no explanation offered there nor elsewhere in the record as to what was the "basis of claim" nor how the proposed amount of interest was ascertained by the supposed use of that theory. This position of the Commissioner of Internal Revenue was contrary to the established practice of the Bureau of Internal Revenue (Finding of Fact XX, R. 36).

The Commissioner of Internal Revenue persisted in his refusal to increase the amount of interest to be allowed [with the exception of a slight increase due to a mistake theretofore made by the Commissioner in

regard to the date upon which one of the claims for the year 1917 was filed and corrected in the second paragraph of his letter to respondent dated July 2, 1924, contained in Finding of Fact XVI (R. 33)], and under date of July 21, 1924, sent to respondent a "Notice of Interest Allowance" in respect of each of the years 1916 and 1917 together with check in payment of the interest as shown by these certificates to have been allowed in the total amount of $35,369.05 (Finding of Fact XVII, R. 34). The interest allowance in respect of the refund for each of the years involved is shown by these notices of interest allowance as follows:

Year 1916, Interest allowed on refund of $105,571.95	$19,171.21
Year 1917, Interest allowed on refund of $1,131,075.86	16,197.84
Total	$35,369.05

In each of such notices it is stated the interest was allowed "Under section 1324(a) of the Revenue Act of 1921" (R. 34, 35). By section 1100(a) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 352), section 1324(a) of the Revenue Act of 1921 (c. 136, 42 Stat. 227), was repealed to take effect upon the passage of the 1924 Act and by section 1019 of that act, which took effect simultaneously with that repeal, provision was made for the payment of interest upon refunds.

Respondent protected its rights to claim additional interest in the Treasury Department and in the courts (Finding of Fact XVIII, R. 35).

Respondent maintains it was entitled to interest upon the refundments made under section 1019 of the Revenue Act of 1924, as the court below held, or under

section 1116 of the Revenue Act of 1926 (c. 27, 44 Stat. 9). The amount of such interest would be the same under either the 1924 or 1926 Acts. Petitioner on the other hand asserts section 1324(a) of the 1921 Act governs. Respondent further maintains that even though that section of the 1921 Act did apply that the payment of interest to respondent in the amount of $35,369.05 on July 21, 1924, was not made in accordance with the provisions of that section of the Revenue Act of 1921. There are no facts in the record to show how the amount of interest paid respondent was arrived at.

Counsel have prepared from facts in the record the two following tables, which show, it is hoped, in convenient and helpful form, the salient facts in respect of respondent's returns and refund claims and the action of the Commissioner of Internal Revenue upon the claims.

YEAR 1916

TABLE SHOWING FILING OF RETURNS AND REFUND CLAIMS BY RESPONDENT AND ACTION OF COMMISSIONER OF INTERNAL REVENUE UPON CLAIMS.

Tax paid	$215,852.72
Tax refunded	105,571.95
Net tax	$110,280.77
Interest paid on refund	19,171.21

Returns Filed and Taxes Paid.	*Claims Filed.*	*Action of Commissioner upon the Claims as Shown by his Letter of Oct. 8, 1923, (Finding IX, R. 27) and by his certificate of Overassessment No. 118,905. (Finding XI, R. 28.)*	*Position of Commissioner in his Letter of January 18, 1924 (Finding XIII, R. 30).*
Mch. 27, 1917. *Original Return* showing tax of $206,079.86. Paid June 14, 1917. (Finding II, R. 24.)			
June 15, 1917. *First Amended Return* showing additional tax of $9,772.86. Paid under "additional assessment" August 7, 1917. (Finding II, R. 24.)			
June 17, 1918. *Second Amended Return* showing overpayment of $30,217.11. (Finding III, R. 24.)	June 17, 1918, with Second Amended Return. (Finding III, R. 24.)	Rejected in full. (Finding IX, R. 27.)	Said to be allowed for $22,360.22.*
September 20, 1920. *Third Amended Return* showing tax liability of $101,287.28. (Finding IV, R. 24.)	Sept. 20, 1920, with *Third Amended Return*. Claim for $114,565.44, "or such greater amount as is legally refundable." (Finding IV, R. 24.)	Allowed for $105,571.95* (total refund for year 1916) and rejected for $8,993.49. (Finding X, R. 28.)	Said to be allowed for $82,853.32.*
		*Refunded November 22, 1923.	*Balance of 1916 refund, viz., $338.43, said to be "allowed upon the basis of points not raised in claims." (Finding XIII, R.

YEAR 1917

TABLE SHOWING FILING OF RETURNS AND REFUND CLAIMS BY RESPONDENT AND ACTION OF COMMISSIONER OF INTERNAL REVENUE UPON CLAIMS.

Tax paid	$1,966,600.87
Tax refunded	1,131,075.86
Net tax	$835,525.01
Interest paid on refund	16,197.84

Returns Filed and Taxes Paid.	*Claims Filed.*	*Action of Commissioner upon the Claims as Shown by his Letter of Oct. 8, 1923, (Finding IX, R. 27) and by his certificate of Overassessment No. 16,366 (Finding XI, R. 28.)*	*Position of Commissioner in his Letter of January 18, 1924 (Finding XIII, R. 30).*
May 18, 1918. *Original Returns.* No tax paid thereunder. (Finding V, R. 25.)			
May 27, 1918. *First Amended Returns* showing tax of $1,966,600.87. Paid June 15, 1918, under protest. (Finding V, R. 25.) January 28, 1919. *Second Amended Returns* showing additional tax of $5,390.17. *Never paid.* (Finding V, R. 25.)	June 12, 1920. Claim for $1,966,600.87. (Finding VI, R. 26.)	Allowed for $1,131,075.86* (total refund for year 1917). Rejected for $835,525.01. (Finding IX, R. 27.)	Said no part of overassessment was allowed on basis of this claim.
September 20, 1920. *Third Amended Returns* which showed tax liability of $961,061.45 (Finding VI, R. 27.)	September 20, 1920. Claim for $1,005,519.42 "or such greater amount as is legally refundable" filed with Third Amended Returns. (Finding VI, R. 27.)	Rejected in full. (Finding IX, R. 27.)	Said to be allowed for $105,556.34.*
		*Refund made November 22, 1923.	*Balance of 1917 refund, viz., $1,025,519.52, made November 22, 1923, said to be "attributable to points not raised in claims." (Finding XIII, R. 30.)

ARGUMENT.

POINT I.

RESPONDENT, AS HELD BY THE COURT BELOW, IS ENTITLED TO INTEREST UNDER SECTION 1019 OF THE REVENUE ACT OF 1924 UPON THE TOTAL REFUNDS FROM THE DATES THE TAXES WERE PAID TO THE DATE OF THE ALLOWANCE OF THE CLAIMS.

The only pertinent facts under this point are the dates of the payments of the taxes by respondent for the years 1916 and 1917 and the date of the allowance of the refundments. Respondent established the other facts found out of an abundance of caution. They are pertinent only in the event the court should hold the provisions governing the payment of interest upon the refunds to respondent were those contained in section 1324(a) of the Revenue Act of 1921.

(a) *Congress possessed the power to change the provisions of section 1324(a) of the Revenue Act of 1921 in respect of the payment of interest upon refunds in all cases where such interest had not been theretofore paid.*

In this case petitioner contends Congress could not alter the rights of petitioner to interest upon these refunds by legislation subsequent to the refundment of the illegally exacted taxes. On page 9 of their brief counsel state:

> At the time the refund was allowed in this case the Revenue Act of 1921 was in force. The rights of the parties then became fixed.

Again on page 10:

The better view is that the right to interest which became fixed by the allowance of the refund while the 1921 Act was in effect was not divested or changed by the 1924 Act or by repeal of the 1921 Act.

In order that a right may amount to a vested right and be protected from impairment by the United States, it must constitute "property" under the due process clause in the Fifth Amendment. Contract rights in so far as they amount to property, are protected under this amendment from direct impairment by the Federal Government. *Hepburn v. Griswold*, 8 Wall. 603. Hence the position of petitioner must be founded upon the premise that the grant by Congress of interest upon refundments of internal revenue taxes constitutes a property right or a contract right amounting to property. This we submit is not the law. In this connection it is obviously unnecessary to attempt to broadly define when acts of Congress confer property rights and when they do not. In this case it is sufficient to show that statutes pertaining to the imposition, collection and refund of taxes do not confer property rights.

In *Brushaber v. Union Pacific Railroad*, 240 U. S. 1, which involved the constitutionality of the Revenue Act of 1913 (Sec. II, c. 16, 38 Stat. 166), which was the first income tax law passed after the adoption of the Sixteenth Amendment, the court in repelling the contention that such act contravened the constitution in that it attempted to deprive appellant of rights previously vested in him, said (p. 24):

> So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally

> well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause. *Treat v. White*, 181 U. S. 264; *Patton v. Brady*, 184 U. S. 608; *McCray v. United States*, 195 U. S. 27, 61; *Flint v. Stone Tracy Co.*, 220 U. S. 107; *Billings v. United States*, 232 U. S. 261, 282.

In Cooley on Taxation, 2d Ed. Vol. 1, Sec. 134, p. 317, it is stated:

> So far as taxation is concerned, there is no vested right to the continuance of any particular tax, or particular apportionment of taxes.

There can be no doubt that provisions for the refund of taxes, and for the payment of interest thereon, are an exercise of the taxing power of Congress.

The principle asserted by petitioner if carried to its inevitable conclusion would mean a denial of the power of Congress to alter the status of a citizen under an existing taxing statute.

If the "right" to interest upon refunds were a fixed, definite, vested right, then Congress would be powerless to increase or decrease the rate of such interest or the conditions under which it became payable. If the interest right be of the character claimed by petitioner, it would follow that the rate of the tax itself could not be changed retroactively; nor would an income tax law, effective retroactively, be valid. To state this proposition is to answer it. See *Brushaber v. United States, supra; Tyee Realty Company v. Anderson* and *Thorne v. Same*, 240 U. S. 115; *Lynch v. Hornby*, 247 U. S. 339;

Atlantic Coast Line Railway Company v. Doughton, 262 U. S. 413, and *United States v. Heinszen*, 206 U. S. 370.

It is pertinent to note that Congress does not recognize as a vested right the grant of interest upon refunds of internal revenue taxes. This is well shown by sections 322 to 325 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 86, 87). By these sections the rates of estate and gift taxes which had been imposed by the Revenue Act of 1924 (c. 234, 43 Stat. 253, 303, 319) were retroactively reduced. Note the provisions of section 325 of the Revenue Act of 1926 as follows (italics added):

> Any tax that has been paid under the provisions of Title III of the Revenue Act of 1924 prior to the enactment of this Act in excess of the tax imposed by such title as amended by this Act shall be refunded *without interest*.

Thus those who received refunds of such taxes were denied interest thereon. By section 325 of the 1926 Act, just quoted, those taxpayers were taken out of the operation of section 1116 of that act, which provides for the payment of interest on "any" refunded internal revenue taxes. Indeed, prior to the passage of the Revenue Act of 1921 the Government had never paid interest on refunded internal revenue taxes. Congress by that act granted that which it had theretofore withheld. Congress saw fit to again withhold interest in the cases of refunds of taxes coming under Section 325 of the present revenue law.

The case of *Texas and Pacific Railway Company v. Anderson*, 149 U. S. 237, cited by petitioner's counsel on page 15 of their brief, is without bearing. The statute there involved was not an act of Congress but of

the legislature of a state. Hence the prohibition contained in the first clause of section 10 of Article I of the Constitution against the impairment by a state of the obligations of a contract was involved. Furthermore, the case does not sustain petitioner's contention for the reason that the amendatory act reducing the rate of interest upon judgments specifically provided that it should apply only to judgments "thereafter obtained." Where a state statute fails to contain similar language, the rule is that the new rate of interest provided by the amendatory act applies to judgments theretofore rendered and unpaid and from the date of the act to the date of payment. See *Morley v. Lake Shore, etc., Railway Company*, 146 U. S. 162. In reaching this conclusion, the court pointed out that the right of plaintiff to interest was not a vested right beyond "* * * the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judgment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the state chooses to prescribe" (p. 169). In respect of such legislation the court said (p. 169):

> The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. "A judgment is, in no sense, a contract or agreement between the parties." *Wyman v. Mitchell*, 1 Cowen 316, 321. In *McConn v. New York Central, etc., Railroad*, 50 N. Y. 176, 180, it was said that "a statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party. Even a judgment founded upon a contract is no contract."

To the same effect see *Evans-Snider-Buel Company v. M'Fadden*, 105 Fed. 293, 300, and *Downs v. Blount*, 170 Fed. 15, 20.

On page 14 of petitioner's brief the Twenty per Cent. Cases, 20 Wall. 179, 187, are relied upon. These cases are clearly inapplicable because the statute there before this court was held to create a contractual right in the plaintiffs to the compensation provided.

In *League v. Texas*, 184 U. S. 156, a statute of the State of Texas providing for the collection of interest upon delinquent taxes was held a proper exercise of the legislative power, notwithstanding it applied retroactively. In reaching this conclusion the court pointed out (p. 158) that "a delinquent taxpayer ha no vested right in an existing mode of collecting taxes. There is no contract between him and the state that the latter will not vary the mode of collection." See also *State v. Western Union Telegraph Company*, 111 Minn. 21. Again, in *Webster v. Auditor General*, 121 Mich. 668, it was held that one owing delinquent taxes has no vested right to have the rate of interest thereon remain unchanged.

Having thus pointed out the undoubted power of Congress to change the grant of interest to respondent at any time prior to its payment, the remainder of this Point of the brief is devoted to showing that Congress did change the grant and, in keeping with the remedial character of the legislation, enlarged the grant so as to compensate taxpayers for the illegal retention of their monies by providing that payments of interest thereafter made be for the entire period of retention.

(b) *Congress exercised this power by the enactment of section 1019 of the Revenue Act of 1924 and the simultaneous repeal of section 1324(a) of the Revenue Act of 1921.*

The refunds were made to respondent as has been shown, on November 22, 1923. At that time the Revenue Act of 1921 (c. 136, 42 Stat. 227) was in force. Section 1324(a) thereof (p. 316) provided as follows:

> That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of one per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

The above section was in force from November 23, 1921, to June 2, 1924. On the latter date the section was expressly repealed by section 1100(a) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 352) to take effect upon the enactment of that act which occurred on June 2, 1924. An examination of section 1100 of the Revenue Act of 1924 shows the absence of a saving clause in respect of section 1324 of the Revenue Act of 1921 pertaining to the payment of interest upon refunds. Section 1100(b) of the 1924 Act contains the usual saving clause in respect of the assessment and collection of taxes imposed by the earlier act.

The provision for the payment of interest upon re-

funds in the Revenue Act of 1924 is contained in section 1019 thereof as follows:

> Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part. (43 Stat. 346).

The Committee on Ways and Means in House Report No. 179, 68th Congress, 1st Session, on H. R. 6715 which became the Revenue Act of 1924, after pointing out the changes made by section 1019 said (p. 35):

> If the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest during the period of their retention; and the fact of protest or a claim does not affect the merits of such an interest payment.

The same paragraph also appears in the report which is appended to the majority committee report and which contains the "Views of Eleven Republicans." (p. 72).

It will be remembered the Commissioner of Inter-

nal Revenue made respondent no allowance of interest whilst the Revenue Act of 1921 was in force. On July 21, 1924, which was after the enactment of the Revenue Act of 1924, the Commissioner made respondent an interest allowance which he asserted was made under section 1324(a) of the Revenue Act of 1921, a section which, as shown, had theretofore been expressly repealed simultaneously with the enactment of the Revenue Act of 1924.

Whilst section 1324(a) of the Revenue Act of 1921 limited the right of recovery of interest to "the allowance of a claim for the refund of or credit for internal revenue taxes paid," section 1019 of the 1924 Act broadened that right by taking language from section 3220, Rev. Stat., as amended by the Act of 1918 (c. 18, 40 Stat. 1057, 1145) so as to cover "any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or any sum which was excessive or in any manner wrongfully collected," the interest to run "from the date such tax, penalty or sum was paid to the date of the allowance of the refund." Those are the principal omissions from, additions to or modifications made in section 1019 of the latter act as compared with section 1324(a) of the former one but the grant of interest at 6 per cent per annum is the same in each section. That grant was continued uninterruptedly by section 1019 of the 1924 Act. We submit that the provisions of the 1921 act which were not reenacted died—they were annulled—and that hence neither the Commissioner of Internal Revenue nor anyone else could thereafter lawfully act thereunder.

The record in the instant case discloses that the Commissioner of Internal Revenue did not order the dis-

bursing clerk to pay interest upon the refund until subsequent to the enactment of the Revenue Act of 1924. As shown by Finding XVI, (R. 33, 34) the Commissioner on July 2, 1924, advised respondent through its counsel in respect of the amount of interest which would be allowed and concluded his letter by stating, "The interest found due *will* be scheduled for allowance and payment." Hence the Commissioner's order to the disbursing clerk to pay this interest of necessity was subsequent to the date of such letter and more than a month subsequent to the passage of the Revenue Act of 1924.

On page 12 of petitioner's brief, counsel state:

> Subdivisions (b) and (c) (of Section 1100 of the Revenue Act of 1924) provide that certain portions of the Act of 1921 which are repealed shall remain in effect for the assessment and collection of taxes and for "the assessment, imposition, and collection of all interest, penalties, or forfeitures which have accrued or may accrue in relation to any such taxes," and it may be contended that the interest referred to in this saving clause is interest owing to the Government and not to the taxpayer, but the obvious purpose of Congress was to preserve the operation of the 1921 Act on tax cases determined while it was in force.

It is not "contended" that the saving clause referred to embraces only interest "owing to the Government." There is no room for contention here at all—the reference in the statute is to the "collection" of interest. The language used is susceptible of no other interpretation. Were it not for the saving clause referred to, the government would have been powerless to collect back taxes due under the Revenue Act of 1921 which

was repealed by the Revenue Act of 1924. It seems almost superfluous to add that had Congress intended the result sought by petitioner, it would have enacted a saving clause in respect of the payment of interest upon refunds. Its failure to do so is perfectly consistent with its repeal of section 1324(a) of the Revenue Act of 1921 and its simultaneous reenactment thereof with modifications as section 1019 of the Revenue Act of 1924. The final reference in the quotation from petitioner's brief to the "obvious purpose of Congress" to preserve the operation of the 1921 Act on "tax cases" determined while it was in force could not be wider of the mark. If counsel's statement were correct, none of the provisions of the Revenue Act of 1924 in respect of taxes imposed by the Revenue Act of 1921 and prior acts would have been enacted but the provisions of the earlier act would not have been repealed. If the purpose of Congress were as claimed by petitioner, the provisions in sections 277(1) and 310(a) in respect of an enlarged statute of limitations in favor of the United States in so far as applicable to taxes imposed by the 1921 Act would not have been enacted.

We now invite the court's attention to the effect of the repeal of section 1324(a) of the Revenue Act of 1921 on June 2, 1924, by the Revenue Act of that year and its reenactment, with modifications, as section 1019 of the latter act. Under such circumstances the universally accepted rule of statutory construction requires that section 1019 of the 1924 Act shall be treated as a continuation of section 1324(a) of the 1921 Act with the modifications contained in the later section just as though such modifications had been contained in section 1324(a) as originally enacted.

This is the gist of the case. The power of Congress in the premises has been shown. When the Commissioner in July, 1924, came to pay respondent interest he should have acted strictly in accordance with the provisions of the only existing law upon the subject, *i. e.*, section 1019 of the 1924 Act. There had been an "allowance" of a refund to respondent as provided in that section. Hence it was clearly the Commissioner's duty to pay to respondent interest in the manner there provided. We now invite attention to the following authorities which, we submit, are conclusive.

In *Blair v. Chicago*, 201 U. S. 400, 475, the court stated:

> As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended. *People v. Circuit Judge*, 37 Michigan, 287. In *Conrad v. Nall*, 24 Michigan, 275, a section in the chapter of the code was amended, and it was held that it was not intended to operate independently of the other provisions of the chapter, but that the whole chapter in its present form must be read as one act. The rule is correctly stated in **Endlich on Statutes, section 294**, as follows: "A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there, and the amendment itself so thoroughly becomes a part of the original statute, that it must be construed, in view of the original statute, as it stands after the amendments are introduced and the matters superseded by the amendments eliminated."

The case of *Blair v. Chicago, supra*, was cited with approval in *Pennsylvania Company v. United States*,

236 U. S. 351, 362, and was followed in *Selectmen of Brookline, Petitioners*, 236 Mass. 269.

Note the following by Mr. Justice Peckham, speaking for the court in the case of *Bear Lake Irrigation Company v. Garland*, 164 U. S. 1, 11, 12:

> Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in Steamship Co. v Joliffe, 2 Wall. 450, 459. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and re-enacting the same as a new and original act.
>
> It is true that the law in the Joliffe case did not contain any saving of or provision for the rights and remedies of the pilot, but the foundation of the reasoning by which the court concluded that the new should be treated as a continuation of the old statute, with modifications, did not rest alone upon this omission. It was chiefly based upon

> the facts above stated: the similarity of the subjects-matter of the two statutes, and that the effect was a continuation of the old statute as modified by the new, notwithstanding the use of language which formally repealed the old statute.

Counsel for petitioner at page 14 of their brief quote from the case of Steamship Company v. Joliffe which is commented upon by the court in its opinion in the Bear Lake Irrigation Company case, *supra*, as shown by the quotation just given.

Clearly there is nothing in the Joliffe case to sustain petitioner's contentions. No one would know from petitioner's quotation from the opinion in the Joliffe case (their brief, p. 14) that an amendatory act had been passed. However, the amendatory act formed the basis of the court's decision. This is shown by the analysis of the opinion in the Joliffe case contained in the opinion in the Bear Lake Irrigation case where the court states "* * * the foundation of the reasoning by which the court concluded that the new should be treated as a continuation of the old statute, with modifications * * *, was chiefly based upon the facts above stated: the similarity of the subjects-matter of the two statutes and that the effect was a continuation of the old statute as modified by the new, notwithstanding the use of language which formally repealed the old statute." (164 U. S. 12.)

It is pertinent here to invite attention to the recent case of *Art Metal Works v. Commissioner of Internal Revenue* before the United States Board of Tax Appeals, Docket No. 16,226, decided Dec. 6, 1927 (not yet reported but see United States Daily, December 9th, 1927, p. 12).

The position of the General Counsel of the Bureau

of Internal Revenue upon the question presented in that case is shown by the following from the opinion of the Board of Tax Appeals:

> Respondent, however, insists that the provision of the Revenue Act of 1924 which repealed the Revenue Act of 1921 as of January 1, 1924, removes the 1921 Act from consideration, and, the five years for collection not having expired prior to the repeal of that Act, any limitation must be found in the 1924 Act substituted for it.

The Board, citing numerous cases in the federal courts, sustained this contention—a contention which is in direct conflict with that made by petitioner's counsel in the instant case.

These cases stand unmodified. They likewise negative the assertion that respondent is seeking a retroactive interpretation of the Revenue Act of 1924 as made by petitioner's counsel on page 10 of their brief.

As shown in the "Statement" herein, it is immaterial to respondent whether it be held the provisions of the 1924 Act (section 1019) in respect of the payment of interest upon refunds are applicable or those of the Revenue Act of 1926 (section 1116). Under either section the amount of interest would be that for which the court below rendered judgment.

Section 1116 of the Revenue Act of 1926 is as follows:

> Sec. 1116. (a) Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax,

penalty, or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount.

(b) As used in this section—

(1) The term "additional assessment" means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency under Title II or Title III of the Revenue Act of 1924 or of this Act;

(2) The term "date of the allowance of the refund" means, in the case of any income, war-profits, or excess-profits tax, the first date on which the Commissioner signs the schedule of over-assessments in respect thereof.

(c) This section shall be applicable to any refund paid, and to any credit taken, on or after the date of the enactment of this Act, even though such refund or credit was allowed prior to such date.

By section 1200 of the 1926 Act, section 1019 of the 1924 Act was repealed, such repeal taking effect simultaneously with the enactment of the former act.

The policy of continuing legislation by Congress in respect of interest upon refunds is thus again shown by section 1116 of the present law. Subdivision 2 of paragraph (b) thereof was enacted to meet the issue presented in the case of *Girard Trust Co. v. United States*, then pending before this court, and decided March 1, 1926, 270 U. S. 163. Paragraph (c) was drawn clearly in the light of the case of *Blair v. United States ex rel Birkenstock and Ronon, Executors*, etc., also then pending before this court and decided on May 24, 1926, 271 U. S. 348.

In the Birkenstock case as the Commissioner of Internal Revenue viewed it, the refund had been "allowed" on May 19, 1924, when he signed the "schedule of overassessment." In this the Commissioner was in error for the court held in the Girard Trust Company case, *supra*, that the "date of allowance" was the day the Commissioner notified the disbursing clerk to pay the refund which in the Birkenstock case was August 12, 1924, which was after the passage of the Revenue Act of 1924.

The court in the Birkenstock case reaffirmed the Girard Trust Company case and further held that where a tax is paid in quarterly installments interest is payable only on the excess over the total amount of the tax and is computed upon the excess from the date paid. Thus if the refunded tax is less than the last installment interest upon the refund begins from the date of payment of such installment. If the refund exceeds the amount of the last installment but not of the two last installments interest is determined upon the full amount of the last installment from its date of payment and upon the balance of the refund from the date of payment of the third installment of tax. Both the Girard Trust Co. case and the Birkenstock case are cited in petitioner's brief. It will be seen from what has just been stated, neither case particularly bears upon the issues here presented.

It seems hardly necessary to add that (c) of section 1116 of the Revenue Act of 1926 in no wise militates against plaintiff's contention. We can find in the subdivision nothing susceptible of an interpretation to prohibit the payment of interest where the refund or

credit was made prior to the passage of the act. Not only would such a construction be contrary to the declared purpose of Congress in respect of these several acts as interpreted in the light of universally accepted rules of construction, but it would cause an omission or interval during which the direction to pay interest would be suspended, a result in the very teeth of the continued policy of legislation and one which would result in manifest injustice to taxpayers. For example, it would mean the Commissioner of Internal Revenue could have defeated the declared purpose of Congress if he made a refund to taxpayers on or before February 25, 1926, of only the illegal exaction, and then upon the enactment of the Revenue Act of 1926 on the following day refused to pay interest. If the inference to be drawn from such a narrow and forced construction of section 1116 (c) be sound the taxpayer would be powerless. It must not be overlooked that in substance that is the very treatment which this plaintiff has received.

We might add it is elemental that the law never creates a vacuum in right except in positive terms. One may look in vain for any positive or other terms which sustain the contention that there has been a suspension of the grant of interest upon refunds allowed since November 23, 1921, the date of the enactment of the Revenue Act of 1921.

The legislative command that upon the "allowance" of a "refund" or "credit," interest shall be paid upon the amount thereof at the rate of 6 per centum per annum has been in force without an instant's interruption since November 23, 1921. We quote again from the opinion of the Court in the case of the *Bear Lake Irrigation Company v. Garland, supra:*

Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act.

POINT II.

EVEN THOUGH SECTION 1324(A) OF THE REVENUE ACT OF 1921 BE HELD APPLICABLE, RESPONDENT WOULD BE ENTITLED TO INTEREST AS FOLLOWS:

(A) FOR THE YEAR 1916: UPON THE REFUND OF TAXES ORIGINALLY PAID, FROM A DATE SIX MONTHS AFTER THE CLAIM WAS FILED TO THE DATE OF THE ALLOWANCE OF THE CLAIM; AND UPON THE REFUND OF TAXES PAID UNDER AN ADDITIONAL ASSESSMENT, FROM THE DATE OF PAYMENT TO THE DATE OF THE ALLOWANCE OF THE CLAIM.

(B) FOR THE YEAR 1917: (1) IF THE PROTEST BE HELD SUFFICIENT, UPON THE FULL AMOUNT OF THE REFUND FOR THAT YEAR FROM THE DATE OF PAYMENT TO THE DATE OF THE ALLOWANCE OF THE CLAIM; OR (2) IF THE PROTEST BE HELD INSUFFICIENT, UPON THE FULL AMOUNT OF THE REFUND FOR THAT YEAR FROM A DATE SIX MONTHS AFTER THE CLAIM WAS FILED TO THE DATE OF THE ALLOWANCE OF THE CLAIM.

The record contains all facts necessary to a determination of the interest payable under each of the bases embraced in this Point.

In respect of subdivision (A) of this Point pertaining to the year 1916, the court below held that section 1019 of the Revenue Act of 1924 was applicable (R. 39), and found, as shown by its Conclusion of Law (R. 36), that respondent "is entitled to recover interest at the rate of 6 per cent per annum to October 11, 1923, on $95,799.09 from June 14, 1917, on $9,772.86 from August 7, 1917 * * *."

The total amount of the refund for the year 1916 is the sum of the two amounts stated in the "Conclusion of Law" quoted from above, *i. e.*, $105,571.95, which was paid respondent on November 22, 1923 (Finding of Fact XI, R. 28). The dates stated from which the interest began to run are those upon which respondent paid its taxes for the year. (Finding of Fact II, R. 24.) The date October 11, 1923, is the date of the allowance of the refund claim (Finding of Fact X, R. 28).

If section 1324 (a) of the Revenue Act of 1921 is applicable respondent insists it is entitled to interest at 6 per centum per annum on $95,799.09 to October 11, 1923, from March 20, 1921 (which is six months after respondent filed claim on September 20, 1920, and which was allowed October 11, 1923, (Finding of Fact IV and X, R. 24 and 28), and on $9,772.86 from August 7, 1917 (the date upon which respondent paid this amount under an "additional assessment") (Finding of Fact II, R. 24).

Petitioner maintains interest was due respondent for the year 1916, calculated in the manner indicated in a letter dated January 18, 1924, from the Commissioner of Internal Revenue to respondent's counsel and contained in Finding of Fact XIII (R. 30-32). In this regard counsel for petitioner have fallen into grave error in assuming that because the court below found

that the Commissioner had written to respondent the letter of January 18, 1924 (R. 30-32) that the court found as facts the statements contained in such letter. On pages 17 and 18 of petitioner's brief counsel refer to "These specific findings as to the form of protest and as to the *grounds on which the refund was finally allowed*" and cite record 31 in support thereof. As shown at record page 31, the Commissioner's letter of January 18, 1924, to respondent is set forth. In the body of that letter reference is made to overassessments being allowed upon "basis of points not raised in claims." No such fact is there established. Petitioner offered nothing to sustain this averment. On the contrary it will be recalled by Finding of Fact X (R. 28) the court affirmatively found that the Commissioner "allowed plaintiff's refund claims on October 11, 1923." The Commissioner's letter of January 18, 1924, attempts, as is shown under this Point of this brief, to undo a past and accomplished fact by asserting that part of respondent's refund claims was allowed under section 252 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 268) which pertains to a refund of taxes as a result not of a refund claim but solely "upon examination of any *return*."

We now purpose showing, assuming Section 1324(a) of the Revenue Act of 1921 (c. 136,42 Stat. 227, 316), to be applicable, that the record contains all facts requisite to a proper application of that section, and to further show the amounts of interest which would be due respondent thereunder. This part of the argument is applicable to both sub-divisions (A) and (B) of this Point.

At page 47 there is a table showing the amount of interest to which respondent is entitled under a

proper construction of section 1324(a) of the 1921 act for each of the years involved under each of the several bases stated in the Point and the amount of interest paid to respondent for such years by the Commissioner of Internal Revenue.

We repeat section 1324(a) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 316) was as follows:

> That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term "additional assessment" as used in this section means a further assessment for a tax of the same character previously paid in part.

A mere glance at that statute and the briefest consideration of the outstanding facts and a little mental arithmetic disclose at once a thwarting by the Commissioner of Internal Revenue of the legislative command to the serious financial detriment of respondent. We will demonstrate: As appears from the statute the shortest period of time for which interest could run would be from six months after filing refund claim to the date of the allowance of the claim and it also appears that interest is at the rate of one-half of 1 per centum per month and the interest is upon "the total

amount of such refund." Thus we have the minimum period the interest may run, the principal and the rate of interest. In the instant case the latest claims were filed on September 20, 1920. Six months thereafter was March 20, 1921. The date of the allowance was October 11, 1923. Thus the minimum interest period was 2 years, 6 months and 21 days, or 30 months and 21 days. Interest upon the total refund of $1,236,687.81 for that period is $189,772.28. This is the lowest possible amount of interest respondent could be entitled to under the Revenue Act of 1921. (As a matter of fact as is presently shown under this Point, even under Section 1324(a) of the Revenue Act of 1921, respondent would be entitled to interest in an amount well in excess of this minimum). The Commissioner of Internal Revenue allowed and paid respondent interest in the amount of $35,369.05. Again, consider alone the refund of $1,131,075.86 for the year 1917 upon which the Commissioner paid respondent interest in the sum of but $16,197.84. This interest payment represents interest upon the allowed amount for less than three months, whereas the minimum period as shown above was over 30 months. It was these flagrant invasions of respondent's rights which the judgment of the Court of Claims corrected.

Adverting again to section 1324(a) of the Revenue Act of 1921 it will be noted the sole requirement in order that a taxpayer "shall" obtain interest is that there be an "*allowance of a claim* for the refund of or credit for internal revenue taxes paid." This sole requirement has been squarely met in this case. By the Commissioner's letter of October 8, 1923 (Finding of Fact IX, R. 27), respondent was informed that (italics added) "the claim for refund of $114,565.44, in-

come taxes for the year 1916, *will be allowed* for $105,571.95 and rejected for $8,993.49," and that "the claim for refund of $1,966,600.87 income and profits tax for 1917 *will be allowed* for $1,131,075.86 and rejected for $835,525.01." With regard to the overassessments (the amounts for which claims were allowed) the Commissioner stated in the official certificate of overassessment sent to the respondent (Findings of Fact XI and XII, R. 28, 29) that each over-assessment is (italics added) "*allowed* in connection with the examination of a *claim for refund* filed by you within the required time as prescribed by section 3228 of the Revised Statutes as amended by section 1316 of the Revenue Act of 1921." These certificates of over-assessment were accompanied by a Treasury warrant in full settlement of exactly the amount which respondent was informed that its "*claim*" would be "*allowed*" for and in exactly the amount which respondent was officially informed its *claims* had been "*allowed*" for. Accordingly there has been "*an allowance of a claim*" which secured to respondent the right to receive interest, in the words of section 1324(a), upon the "*total amount of such refund.*" The provision respecting the payment of interest upon the "*total*" amount of the refund is mandatory and grants no authority to the Commissioner of Internal Revenue or any other officer of the government to base the interest payment upon any other amount.

The Commissioner's letter of October 8, 1923, (Finding of Fact IX, R. 27) unequivocally states precisely what disposition will be made of the four claims therein referred to—two for the year 1916 and two for the year 1917. It points out that the claim for $30,217.11, which was filed on June 17, 1918, with the second amended

return for the year 1916, will be rejected in full. It advised respondent that its claim of September 20, 1920, for $1,005,519.42 on account of the year 1917 will likewise be rejected in full. It then states that the claim of September 20, 1920, which was for the refundment of $114,565.44, the amount of tax which had been paid for the year 1916, "will be allowed for $105,571.95 and rejected for $8,993.49," and further, that "the claim for refund of $1,966,600.87 income and excess profits tax for 1917 will be allowed for $1,131,075.86 and rejected for $835,525.01." Obviously when a claim is presented to the Commissioner of Internal Revenue there can be but one of three actions taken thereon, (a) it may be allowed in full, (b) it may be rejected in full, and (c) it may be allowed in part and rejected for the balance.

Three days after the above mentioned letter from the Commissioner of Internal Revenue to respondent the Commissioner "allowed" the two claims referred to in the amounts of which he had advised respondent. On November 22, 1923, still acting in accordance with the letter of October 8, 1923, the Commissioner of Internal Revenue actually refunded to respondent the precise sums which he had informed respondent by his letter of October 8, 1923, would be refunded to it upon the refund claims which it had filed.

The command of the statute is there in unmistakable terms "that upon the *allowance of a claim* * * * *interest* shall be allowed and paid upon the *total* amount of such refund * * *." Could any statute be more clear or explicit?

So we find this respondent in good faith presenting its claims and submitting evidence in support thereof in accordance with the rules of the Bureau. Then it

was informed its claims would be allowed, followed, three days later by an official allowance. Less than one and a half months later respondent received a check without interest in the amount that it was advised its claims would be allowed for and in the amounts its claims actually were allowed for.

Clearly the requirements of the statute had been fully met. After the requirements had been so met and the refunds made the Commissioner in attempting to justify his changed position which resulted in a reduction of interest payment to respondent from $401,168.47 (total of judgment below and interest paid July 21, 1924) to $35,369.05, stated in his letter of July 2, 1924, to respondent that "The fact that the certificates of overassessment recited that the refunds were based upon the taxpayer's claim is not controlling for interest purposes." (Finding of Fact XVI, R. 33).

On page 7 of petitioner's brief it is stated:

> In due course the Commissioner of Internal Revenue acted on the various claims for refund, and on October 8, 1923, notified respondent that such claims would be allowed in the sum of $105,571.95, for the year 1916, and in the sum of $1,131,075.86 for the year 1917. (R. 31.)

The court would seem to be entitled to a few words of explanation in this regard. At page 31 of the record cited by petitioner the Commissioner's letter of October 8, 1923, does not appear. That letter is contained in Finding of Fact IX, R. 27. Indeed at page 31 of the record to which petitioner refers is the Commissioner's letter of January 18, 1924, in which the Commissioner attempts to undo his letter of October 8, 1923. The tables appearing herein (pp. 10 and 11) clearly show the inconsistent positions of the Commissioner in this regard.

We find the Commissioner in his letter of January 18, 1924, to respondent, (Finding of Fact XIII, R. 30) contradicting his former official communications in respect of which claims had been allowed. No explanations are offered for this extraordinary effort on the part of the Commissioner to undo that which had already been done.

This record is devoid of any finding to show the manner in which the Commissioner arrived at the amount of interest which he paid to respondent on July 21, 1924. In other words, respondent was advised (R. 31) interest was payable only upon that amount of the refund which was allowed upon the "bases of claims." There is no word in the record to show what constitutes "bases of claims" nor wherein the refunds made respondent by the Commissioner were predicated upon the "bases" of such claims. On the contrary the record shows amended returns were made a part of the refund claims and thus every item of gross income and every item of deduction was included in the claims. Further the record shows that such claims were actively prosecuted over a period of years with the result that they were officially "allowed" on October 11, 1923. (Findings of Fact IV, VI, VII, VIII, X, R. 24, 26-27, 27, 28.) The absence from the record of facts to sustain this "basis of claim" theory is fatal. It is elementary to state that the burden was upon petitioner to support this affirmative defense.

In respect of the payment of $9,772.86 paid by respondent on August 7, 1917 (Finding of Fact II, R. 24) under an "additional assessment," section 1324(a) of the Revenue Act of 1921 expressly provides that interest (italics added) "shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of one per centum per month to the date of

such allowance as follows: * * * if such amount was not paid under protest but *pursuant to an additional assessment, from the time such additional assessment was paid.*"

In view of the formal "allowance" of respondents claim for the year 1916, filed September 20, 1920, and actual refund thereunder of $105,571.95 we submit we have shown that under section 1324(a) of the Revenue Act of 1921 respondent is entitled to interest thereon at 6 per centum per annum as provided by the act, as follows:

On $95,799.09 from March 20, 1921 (six months after claim of September 20, 1920, was filed), to October 11, 1923 (the date of the allowance of the claim)	$14,700.57
On $9,772.86 from August 7, 1917 (the date this amount was paid under an "additional assessment" to October 11, 1923 (the date of the allowance of the claim).	3,605.65
Total interest account refund for year 1916.	$18,306.22
Commissioner of Internal Revenue allowed interest on account of refund for this year in the sum of (Finding of Fact XVII, R. 34)	19,171.21
Overpayment of interest	$864.99

This overpayment of interest for this year is due to the alleged allowance of claim filed June 17, 1918, in the amount of $22,360.22 as stated in Commissioner's letter of January 18, 1924, in which the Commissioner attempted to undo his prior action of October 11, 1923, when he formally allowed respondent's claim of September 20, 1920. This is well shown by the table on p. 10 in respect of the year 1916, columns 3 and 4.

Referring now to the year 1917 embraced in (B) (1) of this Point and which is that if the protest which accompanied respondent's payment for this year be held sufficient, respondent is entitled to interest upon the full amount of the refund from the date of payment to the date of the allowance of the claim, we submit as follows:

It will be recalled the requirement of section 1324(a) of the Revenue Act of 1921 in respect of protest was that there be "a specific protest setting forth in detail the basis of and reasons for such protest." There is no requirement that the protest state the grounds upon which the taxpayer might thereafter (probably many years thereafter) receive a refund of such taxes. Congress never expects citizens to do the impossible. No human being could foretell in June, 1918, when the taxes for 1917 were payable, what changes might result from future decisions of the courts or ruling by Bureau officials. But, nevertheless, we submit the record here discloses that not only does the protest of respondent set forth in detail "the basis of and reasons for *such protest*" but it goes further and embraces grounds upon which the refunds were thereafter made, *i. e.*, illegality of the Bureau's then regulations.

For convenience we repeat respondent's protest which accompanied its payment on June 15, 1918, of income and profits taxes for the year 1917 as follows (Finding of Fact V, R. 25):

> The Magnolia Petroleum Company hereby protests against the payment of Income Taxes which are alleged to be imposed by the Act approved September 8, 1916, as amended by the Act approved October 3, 1917, and the War Income Tax Act embodied in said Act approved October 3, 1917, and the War Excess Profits Tax Act embodied in

said Act approved October 3, 1917. The said Company protests against the payment of said taxes in the amount of $1,966,600.87, or in any other amount at this time or any other time, and said taxes are paid by the Company under protest, involuntarily and under duress, in order to avoid the penalties as prescribed in said Acts for non-payment which the Collector of Internal Revenue for this district states he will enforce against said Company in the event payment is not made. The grounds, among others, of such protest and involuntary payment are that said acts are unconstitutional and void, their terms ambiguous and uncertain; that the Magnolia Petroleum Company is not a corporation, joint stock company, or association or insurance company within the meaning and intendment of said Acts; the regulations which have been attempted to be prescribed under said Acts are not authorized thereby and that the method of applying the rates of taxation as is attempted in Article 16 and in other articles of said regulations under the War Excess Profits Tax Law is arbitrary and unjust, and without sanction in said Act. The said Company hereby formally notifies the said Collector of Internal Revenue and the Commissioner of Internal Revenue of its purpose and intention to institute suit or suits against them or either of them or against the United States, as the said company may be advised, for the recovery of said sum or any part thereof, together with interest and all proper costs.

On page 7 of petitioner's brief it is stated:

Original and amended income and excess profits tax returns for the year 1917 were filed by respondent on May 18, 1918, and May 27, 1918, respectively, indicating a liability of $1,966,600.87, which amount respondent paid on June 15, 1918, *under protest*, a copy of which is set forth in the

findings (R. 25), and which does not appear to state any ground on which refund was finally allowed (R. 31).

This statement is hardly justified by the record. The court below found that "The payment was made involuntarily, under duress and in order to avoid distraint proceedings by the collector against plaintiff's property and the payment of said taxes by plaintiff was accompanied by a written specific protest which set forth in detail the basis of and reasons for such protest" (Finding of Fact V, R. 25). It may be added that among other averments, as shown above, respondent's protest stated that the terms of the taxing statute were "ambiguous" and that the regulations were not authorized by the statute and that the method of applying the rates of tax in such regulations was "arbitrary and unjust and without sanction in said act" (Finding of Fact V, R. 25). In this connection note the nineteenth finding by the court below (R. 35):

> "Regulations No. 33 (revised) governing the collection of the income tax imposed by the act of September 8, 1916, as amended by act of October 3, 1917," promulgated January 2, 1918, were vague and ambiguous, especially in reference to depletion, inventories, and depreciation so that it was impossible for plaintiff when it filed its first amended return on May 27, 1918, to correctly calculate the amount of depletion and depreciation deductions to which plaintiff was entitled under the law and it was likewise impossible for plaintiff, because of the aforesaid conditions of said regulations, to correctly calculate its opening and closing inventories and the conditions aforesaid continued up to and subsequent to the date of payment of said tax for said year.

The protest and findings of fact in the instant case fully meet the requirements of the statute as construed by the court in *Girard Trust Co. et al. v. United States*, 270 U. S. 163. The court there states (pp. 172-3):

> The Government's contention is that the distinction made in sec. 1324, by which the interest to be paid on refunded taxes is to date from the payment of the taxes in cases where there is a specific protest setting forth in detail the basis and reasons for such protest, and by which the interest is to be dated only from six months after date of filing the claim for refund or credit when there is no protest, was intended to favor those who furnished to the collecting officers by way of specific protest a valid basis for a refund of the taxes.
>
> We agree with this view. To hold otherwise would be to invite a protest on any pretended ground by taxpayers in every case of payment and would make the protest of no value to the Treasury or the collecting officers. A protest is for the purpose of inviting attention of the taxing officers to the illegality of the collection, so that they may take remedial measures at once. But if protests are based on reasons of no validity, they do not accomplish the public purpose for which they are devised.
>
> In the present case, the protest was based on a decision of the District Court of Connecticut made December 16, 1920. *Brewster v. Walsh*, 268 Fed. 207. That case was reversed in *Walsh v. Brewster*, 255 U. S. 536, March 28, 1921, or more than two months before the payment of the June 15 installment by the trustees. The statement added under the June 15 installment was merely a recital that an investigation was going on between the Government and the trustees, and that if that turned out to be in excess of the right amount, the

> payment was without prejudice to the recovery of the excess. This was certainly not a protest for specific reasons in accordance with the requirement of the statute. For these reasons, we think that no recovery can be had for failure to allow interest for the period of the six months after the date of payment.

The reference in the court's opinion to a "valid basis for a refund of the taxes" clearly does not mean a basis then recognized as valid by the department. If that were so the *payment* would not be required. It means a fair statement of bases which might, as in the instant case, thereafter be recognized by the department as valid. In this connection petitioner's brief states on page 19:

> Of course, no matter how specific the protest may be, if it does not state a ground on which a claim for refund can be or is allowed, it is insufficient to entitle the taxpayer to interest from the date the tax was paid.

Respondent's protest in this case fully met this test. The refunds were actually made because of the recognition by the Treasury Department several years later of the soundness of certain of the grounds of the protest. Other grounds, such as the unconstitutionality of the statute, were clearly such that a refund "can be" predicated thereon or could have been had this court for any reason held the Revenue Act of 1917, or parts thereof, unconstitutional. Revenue acts have been so held. See *Pollock v. Farmers Loan & Trust Company*, 157 U. S. 429. See also *Blodgett v. Holden, Collector*, (decided November 21, 1927, 48 Sup. Ct. Reporter, 105), in which the Gift Tax Law embodied in Part 2 of Title III of the Revenue Act of 1924, was held uncon-

stitutional in so far as it attempted to reach gifts made prior to the passage of the act.

The interest to which respondent would be entitled under (B) (1) of this point, *i. e.*, on the basis that the protest was sufficient, is as follows:

On $1,131,075.86 from June 15, 1918 (the date of the payment of the tax), to October 11, 1923 (the date of the allowance of the refund)	$361,123.08
The Commissioner of Internal Revenue allowed interest on account of refund for this year in the sum of (Finding of Fact XVII, R. 35)	16,197.84
Underpayment of interest	$344,925.24

This small amount of interest paid respondent is due to the position of the Commissioner in attempting by his letter of January 18, 1924, to undo his prior allowance on October 11, 1923, of respondent's claim filed June 12, 1920, and by claiming further in that letter that respondent's claim filed September 20, 1920, which he had previously rejected in full, was allowed for $105,556.34, and that the balance of the refund, viz., $1,025,519.52, was attributable to points "not raised in claims." The action of the Commissioner in these respects is well shown in the table for the year 1917 appearing on p. 11 herein, columns 3 and 4.

The refund on "points not raised in claims" was asserted by the Commissioner to have been made under sections 250 and 252 of the Revenue Act of 1921. In this regard the court below said:

> No interest is provided under section 252, for the simple reason that the excess payment is im-

mediately refunded, and there is consequently no loss to the taxpayer. (R. 39)

Continuing and referring to respondent the court stated:

> Such a situation is in no sense analogous to the case of a taxpayer whose excess payment was retained by the Government for more than five years and was finally discovered in an investigation resulting from the filing of a formal claim for refund. *Ibid.*

Further it must be remembered there is not a scintilla of evidence in this case to support the basis of claim theory. Petitioner's brief makes no reference to section 252 of the Revenue Act of 1921.

In respect of (B) (2) under this Point, which pertains to the amount of interest to which respondent would be entitled if its protest be held insufficient, it need only be said it would be upon the amount paid for the year 1917, from six months after claim was filed to the date of the allowance of the claim. This is as follows:

On $1,131,075.86 from Dec. 12, 1920 (six months after claim of June 12, 1920, was filed), to October 11, 1923 (the date of the allowance of the claim)	$192,019.49
The Commissioner of Internal Revenue allowed interest on account of refund for this year in the sum of (Finding of Fact XVII, R. 35)	16,197.84
Underpayment of interest	$175,821.65

SUMMARY TABLE UNDER POINT II

YEAR 1916.

Interest due respondent	$18,306.22
Interest paid respondent	19,171.21
Overpayment of interest	$864.99

YEAR 1917.

(1) If protest be held sufficient:

Interest due respondent	$361,123.08
Interest paid respondent	16,197.84
Underpayment of interest	$344,925.24

(2) If protest be held insufficient:

Interest due respondent	$192,019.49
Interest paid respondent	16,197.84
Underpayment of interest	$175,821.65

In respect of (1) and (2) above showing underpayments of interest to respondent there should be credited the overpayment to respondent of $864.99 for the year 1916. The net amounts, therefore, of interest to which respondent would be entitled under (1) and (2), respectively, of Point II hereof are as follows:

Under (1), $344,925.24 less $864.99, or $344,060.25
Under (2), $175,821.65 less $864.99, or $174,956.66

CONCLUSION.

It is respectfully submitted it is shown by Point I that the provisions of section 1019 of the Revenue Act of 1924 are applicable and hence the judgment of the court below in the amount of $365,799.42 should be

affirmed. Further, that if it be held that section 1324(a) of the Revenue Act of 1921 applies, respondent is entitled under Point II, if the protest be held sufficient, to additional interest in the net amount of $344,060.25 and, if the protest be held insufficient, to additional interest in the net amount of $174,956.66.

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Dated December 27, 1927.